

BOARD OF HEALTH AND ENVIRONMENTAL CONTROL
SUMMARY SHEET
December 9, 2010

[x] ACTION/DECISION
[] INFORMATION

- I. TITLE: Proposed Repeal of Regulation 61-99, Hazardous Waste Management Planning Legislative Review is required
- II Subject: Request Initial Approval to Publish a Notice of Proposed Repeal of Regulation 61-99 in the *State Register* to Provide Opportunity for Public Comment.

III. Facts:

1. R.61-99 was promulgated and published as a final regulation in the *State Register* on January 26, 1990, Vol. 14, Issue No. 2. It requires a “demonstration of need” before any applicant can receive a permit to establish or expand a hazardous waste management facility. This need can be demonstrated only by reference to the volume of in-state wastes.

2. On April 13, 1995, the United States District Court ruled: South Carolina Department of Health and Environmental Control Regulation 61-99 (III) (C) is declared invalid and is permanently enjoined. Environmental Technology Council v State of SC, 901 F. Supp. 1026 (D.S.C., 1995). The Court held that Regulation 61-99 (III) (C) discriminated against interstate commerce in violation of the Commerce Clause. The District Court ruling was upheld on appeal.

3. This regulation was held invalid by federal case law and the Department is proposing its repeal. This repeal will have no substantial fiscal or economic impact on the State and its political subdivisions or the regulated community and will require legislative review.

4. The S.C. Administrative Procedures Act, S.C. Code Ann. Section 1-23-10(4) includes repeal in its definition of a regulation. Pursuant to S.C. Code Ann. Section 1-23-110 the Department is required to process a repeal in the same manner as if pursuing promulgation of a new or amended regulation.

5. A Notice of Drafting for repeal of R.61-99 was published in the *State Register* on June 25, 2010, and also in the Department’s Regulation Development Update on the Regulatory Information website. A copy is submitted as Attachment D. No comments were received during the thirty day comment period which ended July 26, 2010. The proposed repeal was submitted for Department internal review.

IV. ANALYSIS: A federal court ruling that was upheld on appeal made this regulation null and void. The regulation has remained in the Code of Regulations of the S.C. Code of Laws. It is obsolete and cannot be enforced. In the interest of good government and efficiency, the Department proposes repeal of Regulation 61-99. A statement of Need and Reasonableness is submitted as Attachment A.

V. RECOMMENDATION:

Bureau staff recommends that the Board grant initial approval to publish a Notice of Proposed Regulation for the proposed repeal of R.61-99 in the *State Register*, to provide opportunity for public comment, and to allow staff to proceed with a public hearing before the Board.

Submitted by:

Approved by:

Daphne G. Neel
Bureau Chief
Bureau of Land and Waste Management

Robert W. King, Jr., P.E.
Deputy Commissioner
Environmental Quality Control

Attachments:

- A. Statement of Need and Reasonableness
- B. Text of Proposed Repeal
- C. Draft *State Register* Notice of Proposed Regulations
- D. *State Register* Notice of Drafting, published June 25, 2010

ATTACHMENT A
STATEMENT OF NEED AND REASONABLENESS
PROPOSED REPEAL OF REGULATION 61-99
HAZARDOUS WASTE MANAGEMENT PLANNING

December 9, 2010

This Statement of Need and Reasonableness complies with SC Code Ann. Section 1-23-115(c)(1)-(3) and (9)-(11)

DESCRIPTION OF REGULATION: Proposed Repeal of Regulation 61-99, Hazardous Waste Management Planning

Purpose: Repeal of 61-99, Hazardous Waste Management Planning.

Legal Authority: S.C. Code Ann. Section 44-56-10 et seq.; 1-23-110

Plan for Implementation: Upon final approval by the Board of Health and Environmental Control and publication in the *State Register* as final, this regulation will be removed from the Code of Regulations of the S.C. Code of Laws.

**DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION
BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:**

This regulation was promulgated and published as a final regulation in the State Register Vol. 14, Issue No. 2 on January 26, 1990. When this regulation was enacted, each state was obligated to certify that it would have waste disposal capacity sufficient for the next twenty years. Sites suitable for proper disposal of hazardous waste were limited, and to insure the availability of hazardous waste management facilities to the industries of South Carolina, applicants for permits to establish or expand hazardous waste management facilities would demonstrate to the Department the need for such new or expanded facilities.

On April 13, 1995, the United States District Court ruled that South Carolina Department of Health and Environmental Control Regulation 61-99 (III) (C) is declared invalid and is permanently enjoined. Environmental Technology Council v State of SC, 901 F. Supp. 1026 (D.S.C., 1995).

The Court held Regulation 61-99 (III) (C) discriminated against interstate commerce in violation of the Commerce Clause. The District Court ruling was upheld on appeal. States may not engage in economic protectionism, and RCRA contains no clear statement or indication of legislative intent to permit states to override the U.S. Constitution. The federal court ruling which was upheld on appeal declared S.C. R.61-99 null and void. The regulation has remained in the Code of Regulations but cannot be enforced. In the interest of effective government the Department proposes repeal of Regulation 61-99.

DETERMINATION OF COSTS AND BENEFITS: The repeal of R.61-99 will have no substantial fiscal or economic impact on the State and its political subdivisions or the regulated community.

UNCERTAINTIES OF ESTIMATES: No known uncertainties.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH: There will be no environmental or public health effect.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED: There will not be a detrimental effect on the environment and

public health. However, repeal of this regulation is necessary to clarify that it is no longer valid and enforceable, and will eliminate confusion for the regulated community.

STATEMENT OF RATIONALE: Upon review of Department regulations and the status of this regulation, it was determined that R.61-99 should be repealed because it is obsolete and no longer enforceable.

See Statement of Need and Reasonableness above.

ATTACHMENT B
Text of Proposed Repeal
R.61-99, Hazardous Waste Management Planning.
December 9, 2010

Text of Proposed Repeal:

~~61-99. Hazardous Waste Management Planning~~

I. PURPOSE AND SCOPE:

~~— (A) Each State is obligated to certify to the President of the United States that it will have waste disposal capacity sufficient for the next twenty (20) years. Because sites suitable for proper disposal of hazardous waste are limited, applicants for permits to establish or expand hazardous waste management facilities shall demonstrate to the Department the need for such new or expanded facilities in order to:~~

~~———— 1. ensure that the needs of South Carolina industries and other necessary users are met, and to prevent dangerous and illegal disposal practices;~~

~~———— 2. prevent excess capacity which may become technologically obsolete and/or unnecessary as changes occur in production practices, methods of treatment, utilization of waste materials, and other waste minimization efforts;~~

~~———— 3. minimize the burden placed on State resources through activities associated with the permitting, operation, and supervision of such facilities; and~~

~~———— 4. minimize potential adverse environmental and public health effects.~~

~~— (B) This regulation shall apply to applicants for permits to establish or expand facilities for treatment, storage, or disposal of hazardous waste; provided, however, that it shall not apply to facilities operated by enterprises for the treatment, storage, or disposal of hazardous waste at the site of generation; and provided further, that it shall not apply to facilities which apply to the Department for a permit to continue existing activities with existing limitations pursuant to R.61-79, Part 270.10(e)(4), (i.e., a "Part B" permit); and provided further, that it shall not apply to the hazardous waste management activities at those manufacturing facilities which lawfully burn hazardous waste for energy recovery up to the normal rate of manufacturing production, or who lawfully use or reuse the hazardous waste to make a product and demonstrate that the hazardous waste is a safe and environmentally acceptable substitute for raw materials; and provided further that manufacturing facilities who burn hazardous waste for energy recovery or who use or reuse hazardous waste shall demonstrate that they derive the majority of profits from the product produced.~~

~~(C) No hazardous waste facilities subject to this regulation shall be permitted until the demonstration of need is approved by the Department.~~

II. DEFINITIONS:

~~(A) "Available capacity" means permitted capacity available at hazardous waste management facilities that will accept off site generated hazardous waste.~~

~~(B) "Expand or Expansion" means any increase in the permitted capacity of the facility, any change in the types of waste received by the facility, or any increase in the volume or rate of waste permitted to be managed by a facility.~~

~~(C) "Hazardous Waste" means a hazardous waste as defined in R.61-79.261 of the South Carolina Hazardous Waste Management Regulations.~~

~~(D) "Hazardous Waste Management Facility" means any facility for the treatment, storage, or disposal of hazardous waste as defined in R.61-79.~~

~~III. DEMONSTRATION OF NEED REQUIREMENTS FOR HAZARDOUS WASTE:~~

~~(A) Each application for a permit to construct a new facility or expand an existing facility shall be accompanied by a demonstration of need, which shall be of such form and content as the Department may specify.~~

~~(B) The demonstration of need shall be specific for each hazardous waste to be managed at the facility and shall include, but not be limited to:~~

- ~~1. documentation of the remaining available capacity at existing hazardous waste management facilities within the State of South Carolina;~~
- ~~2. documentation of the current volume generated within the state which will require off site management and an annual projection for each of the next five (5) years, based on reliable data; and~~
- ~~3. a description of any additional factors, such as geographical or physical barriers which may limit transportation, or the existence of additional available capacity outside of the State of South Carolina which may serve the projected need.~~

~~(C) For purposes of demonstrating need, Hazardous Waste generated outside the State of South Carolina shall not be included.~~

~~IV. APPEALS:~~

~~An appeal from denial of a permit for failure to demonstrate that a need exists shall be deemed a "Contested Case" as defined in S. C. Code Ann. 1-23-310(2).~~

~~V. SEVERABILITY:~~

~~Should any section, paragraph, sentence, clause or phrase of this regulation be declared unconstitutional or invalid for any reason, the remainder of this regulation shall not be affected thereby. Repealed.~~

ATTCHMENT C
DRAFT STATE REGISTER NOTICE OF PROPOSED REGULATIONS
Document No. _____
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CHAPTER 61
Statutory Authority: S.C. Code Ann. Section 44-56-10, *et seq.*

R.61-99 Hazardous Waste Management Planning Regulation

Preamble:

R.61-99 was promulgated January 26, 1990 and published as a final regulation in State Register Vol. 14, Issue No. 2. It requires a “demonstration of need” before any applicant can receive a permit to establish or expand a hazardous waste management facility. This need can be demonstrated only by reference to the volume of in-state wastes.

On April 13, 1995, the United States District Court ruled: “South Carolina Department of Health and Environmental Control Regulation 61-99 (III) (C) is declared invalid and is permanently enjoined. Environmental Technology Council v State of SC, 901 F. Supp. 1026 (D.S.C., 1995).” The Court held that Regulation 61-99 (III) (C) discriminated against interstate commerce in violation of the Commerce Clause. The District Court ruling was upheld on appeal. In that this regulation was held invalid by federal case law and is no longer enforceable, the Department is proposing its repeal.

The repeal will have no substantial fiscal or economic impact on the State and its political subdivisions or the regulated community. Legislative review of this proposed repeal or a preliminary fiscal impact statement is not required.

A Notice of Drafting for the proposed repeal was published in the State Register on June 25, 2010.

Notice of Public Comment Period Pursuant to S.C. Code Ann. Section 1-23-110(A)(3):

Interested persons are provided an opportunity to submit written comments on the proposed regulation during a public comment period by writing to Richard Haynes, Director, Division of Waste Management, 2600 Bull Street, Columbia, SC 29201. To be considered, written comments must be received no later than 5:00 p.m. on January 25, 2011, the close of the public comment period. Comments received by the deadline date shall be considered by staff in formulating the final proposed regulation for public hearing before the Board as noticed below.

Information or copies of the text of the proposed repeal for public notice and comment may be obtained from the Department’s Regulation Development Update published on the Department’s website at <http://www.scdhec.gov/regulatory.htm>; click the Land and Waste Category and scan down for this proposed regulation. A copy may also be obtained from the Department’s Land and Waste website at: <http://www.scdhec.gov/lwm/html/public.html>, or by calling Carolyn McLaughlin at (803) 896-4254.

Relevant public comments received during the public comment period above-noticed shall be submitted to the Board of Health and Environmental Control in a Summary of Public Comments and Department Responses for the Board’s consideration at the public hearing as noticed below.

Notice of Public Hearing and Opportunity for Public Comment Pursuant to S.C. Code Sections 1-23-110(A)(3) and 1-23-111:

Interested members of the public and regulated community are invited to make oral or written comments on the proposed repeal of R.61-99 at a public hearing to be conducted by the Board of Health and Environmental Control at its regularly scheduled meeting on March 10, 2011. The public hearing will be held in the Board Room of the Commissioner's Suite, Third Floor, Aycock Building of the Department of Health and Environmental Control at 2600 Bull Street, Columbia, S.C. The Board meeting commences at 10:00 a.m. at which time the Board will consider items on its agenda in the order presented. The Board's agenda will be published by the Department 24 hours in advance of the meeting. Persons desiring to make oral comments at the hearing are asked to limit their statements to five minutes and, as a courtesy, are asked to provide written comments of their presentations for the record.

Statement of Need and Reasonableness:

The text of the Statement of Need and Reasonableness is provided to the Board in Attachment A and is omitted here to conserve space in the Board item.

Text of Proposed Repeal:

The text of the proposed repeal is provided to the Board in Attachment B and is omitted here to conserve space in the Board item.

ATTACHMENT D
Notice of Drafting published in the State Register on June 25, 2010

DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
CHAPTER 61

Statutory Authority: S.C. Code Ann. 44-56-10 et seq.
October 14, 2010

R.61-99 Hazardous Waste Management Planning

Notice of Drafting:

The Department of Health and Environmental Control proposes to repeal R.61-99, Hazardous Waste Management Planning. Interested persons may submit their views in writing to Richard Haynes, PE, Director, Division of Waste Management, S.C. Department of Health and Environmental Control, 2600 Bull Street, Columbia, S.C. 29201. To be considered, comments must be received by 5:00 p.m. on July 26, 2010, the close of the drafting comment period.

Synopsis:

This regulation was promulgated January 26, 1990 and published as a final regulation in the State Register, Vol. 14, Issue No. 2. It requires a “demonstration of need” before any applicant can receive a permit to establish or expand a hazardous waste management facility. This need can be demonstrated only by reference to the volume of in-state wastes.

On April 13, 1995, the United States District Court ruled: South Carolina Department of Health and Environmental Control Regulation 61-99 (III) (C) is declared invalid and is permanently enjoined. Environmental Technology Council v State of SC, 901 F. Supp. 1026 (D.S.C., 1995).

The Court held Regulation 61-99 (III) (C) discriminated against interstate commerce in violation of the Commerce Clause. The District Court ruling was upheld on appeal.

Legislative review of these amendments will not be required.